15-1800-15307-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal of Grove Homes, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

This matter came on for hearing on September 20, 21 and 22, 2004 at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401, pursuant to the Notice and Order for Hearing and Prehearing Conference, dated February 19, 2003.

Appearances: Kerri Stahlecker Hermann, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2109, on behalf of the Department of Human Services. Samuel D. Orbovich, Attorney at Law, Orbovich & Gartner Chartered, 408 Saint Peter Street, Suite 417, St. Paul, MN 55102-1187, on behalf of Grove Homes, Inc.

The hearing record closed upon submission of the written replies to closing argument on October 25, 2004.[1]

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, Saint Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

1. Is the Department entitled to recover $276,900.19 from Grove Homes for supported living services provided to K.K.?

2. Is the Department entitled to recover $52,189.08 from Grove Homes for transportation for K.K.?

3. Is the Department entitled to recover $7,653.76 from Grove Homes for transportation for D.L.?

RECOMMENDATION

1. That the Department recover the portion of $52,189.08 and $7,653.76 paid for providing transportation to K.K. and D.L. on days when no transportation was provided.

2. That the Department not recover any of the other payments made.

FINDINGS OF FACT

1. The federal Medicaid program shares with states the cost of delivering necessary medical services to certain needy people whose income and resources are insufficient to meet the cost of their required care. In Minnesota, the program is known as Medical Assistance ("MA"), and the Department of Human Services ("DHS") is the state agency responsible for its administration. Under the Medicaid program, states can apply for "waivers" from certain federal requirements.[2] The waivers allow states greater flexibility to cover home and community-based services as an alternative to institutional care.

2. Minnesota applied for and was granted a waiver to serve persons with mental retardation or related conditions ('MR/RC waiver"). The MR/RC waiver helps support persons with developmental disabilities to live in the community as an alternative to placement in an intermediate care facility.[3]

3. Under the waiver program, states must assure the federal government that, on an average per capita basis, the cost of providing home and community-based services will not exceed the average costs for a similar population in an institution.[4] When the Minnesota Legislature authorized DHS to seek the federal waiver, it required the Commissioner of Human Services to ensure that the payment for the cost of providing home and community-based services under the federal waiver plan would not exceed the cost of intermediate care services.[5]

4. Approved waiver services include, among others, case management by a county employee; residential habilitation services; and day training and habilitation.[6] "Supported living services" are a type of residential habilitation services.

5. Under Minnesota's approved MR/RC waiver, county agencies manage many aspects of waivered services, including determining who is eligible for services, what level of services will be provided, and negotiating contracts with the service providers.[7] DHS allocates the funds for waivered services to the counties based on the number of waivered services clients each county has, and the level of services required for each client.[8] Each county must have a legally binding written agreement with DHS specifying, *inter alia*, that the waiver money will be used only for the services specified in Minn. R. 9525.1860, and that the total cost of providing home and community-based services to all persons will not exceed certain limits set forth in Minnesota Rules part 9525.1910.[9]

6. Grove Homes is a provider of "supported living services," a type of residential habilitation services included in the MR/RC waiver. Grove Homes has one four-bed group home in Pequot Lakes, in Crow Wing County. It has operated since 1996. During the relevant time period, Grove Homes was owned and operated by siblings, Loretta and Joe Marcum, and provided services to K.K. and D.L. under the MR/RC waiver. Ms. Marcum is now known as Loretta Boileau.

7. To receive payment under the waiver program, all service providers, including a provider of home and community-based services, must be enrolled as an MA provider and enter into a provider agreement with DHS.[10] In addition to the provider agreement with the state, a waivered services provider must have a "host county contract" with the human services agency in the county where it provides services.[11] As part of the host county contract, the provider must agree to comply with the waiver rules, Minn. R. 9525.1800 to 9525.1930.[12] Because Grove Homes is located in Crow Wing County, it had a host county contract with that county.[13]

8. All host county contracts include a provision that identifies DHS as a third-party beneficiary, giving DHS the right to enforce the contract.[14]

9. Grove Homes had a host county contract with Crow Wing County for 1998, 1999 and 2000. The contract defined the term "Individual Service Authorization Form" as the form authorizing specific waiver services for an individual, the cost of the service unit and number of service units.[15] The contract said:

> The contractor agrees to provide services in accordance with the Individual Service Authorization Form which is incorporated by reference…. The total amount to be paid by the Agency for home and community-based services purchased from the contractor shall not exceed the number of units multiplied by the rate per unit specified in each Individual Services Authorization Form for the duration of this contract.[16]

10. Under the waiver rules, the host county determines the rates that will be paid to the service providers. There is no dollar limitation on the amount of home and community-based money that counties may authorize to be used per person. However, the county board must comply with certain criteria:

(a) the cost is ordinary, necessary, and related to the person's care;

(b) the cost is for activities which are generally accepted in the field of mental retardation or related conditions and are scientifically proven to promote achievement of the goals and objectives contained in the person's individual service plan;

(c) the cost is what a prudent and cost conscious business person would pay for the specific good or service in the open market in an arm's length transaction; and

(d) the cost is for goods or services actually provided.[17]

11. A county that exceeds its allocation may not have to repay the overpayment to DHS. However, if the total expenditures by all counties exceed the federal requirements, and federal payments are withheld, DHS may assess a portion of the "disallowance" to counties that exceeded their allocation.[18]

12. DHS also publishes a "maximum daily rate" as guidance to the counties, although a case manager may approve a rate that exceeds it. Few clients receive services that exceed the maximum daily rate. In 1998, 1999 and 2000, six or fewer people received supported living services at the maximum daily rate.[19] However, there is no firm upper limit on the amount of services that a county can approve, or the amount it can authorize per person, so long as it does not overspend its state allocation. The package of services is negotiated to meet each person's individual needs.[20]

13. Once the host county has negotiated a contract with a provider, other counties may use that contract as a basis for obtaining services for their clients.[21]

14. Each individual MR/RC waiver client has a "county of financial responsibility," the county that oversees the services provided to that person and the payments for those services.[22] A county case manager from the county of financial responsibility develops an individual service plan for the eligible person, and negotiates with providers for the services to be provided.

15. Clearwater County is the county of financial responsibility for K.K. Hennepin County is the county of financial responsibility for D.L.

16. If the county of financial responsibility wants to place a client in another county, it must request concurrence of the host county.[23] Once the county of financial responsibility has obtained the concurrence of the host county, the county of financial responsibility may use the host county's contract with a provider to obtain services by creating an addendum, or it may enter into its own contract with the provider.[24] In this case, Clearwater County obtained host county concurrence from Crow Wing County to place K.K. at Grove Homes, but did not use the Crow Wing County host county contract. Instead Clearwater County entered into its own contract with Grove Homes.[25] Hennepin County relied on an addendum to Grove Homes' host county

contract with Crow Wing County to provide services to D.L.[26] The host county need not approve the rates paid by the county of financial responsibility.[27]

17. Once the county case manager has developed an individual service plan ("ISP"), and entered contracts with providers, the county of financial responsibility notifies DHS about the services and payment rates that it has authorized. The county enters data electronically into the Medicaid Management Information System ("MMIS"), in a form called a "service agreement." The MMIS generates a service agreement letter and sends that letter to the provider setting forth the client's name, the approved services, the approved number of units of service, rates, and a total amount. It also sends a copy of the service agreement letter to the county case manager and to the individual receiving services, or that person's legal representative.[28] The service agreement must be in place before a provider can bill DHS for services. It is characterized as a "pre-authorization" of the approved services and rates.[29]

18. A provider may not bill for more services or at a higher rate than authorized by the county in the service agreement. It may bill for fewer units of service or at a lower rate.[30]

19. For over 20 years, Howard Gary was the Clearwater County case manager responsible for developing an individual service plan and arranging services for K.K. In 1998, Mr. Gary began planning for K.K.'s discharge from Brainerd Regional Human Services Center (BRHSC) into community living. K.K. is mentally retarded and has numerous maladaptive behaviors, including self-injurious behaviors and aggression.[31]

20. BRHSC recommended that K.K. receive residential services from Grove Homes because Ms. Boileau had worked at BRHSC for many years and was familiar with K.K. Mr. Gary attended discharge planning meetings with BRHSC staff and Ms. Boileau to discuss K.K.'s needs and his transition to Grove Homes.[32]

21. Clearwater County developed its own contract with Grove Homes, to provide both supported living services and transportation to K.K.'s day training and habilitation (DT&H) program. Mr. Marcum submitted a proposed budget to provide supported living services to K.K. at a rate of $174.22 per day. Mr. Gary approved a rate of $181.02 per day for supported living services. The contract was signed by the Clearwater County director, the Board Chair, and by Ms. Marcum on behalf of Grove Homes.[33]

22. The Clearwater County contract provided that the case manager was responsible for preparing and maintaining an individual service plan for the client. Among the terms were: "The case manager . . . agrees to maintain budgeting restraints within funding limits available at any particular time within the waiver slots available to him."[34]

23. The Clearwater County contract did not define the term "Individual Service Authorization Form." But it did set out the services purchased, number of units and unit cost for supported living and transportation.[35]

24. The Clearwater County contract stated:

> The Provider agrees to provide the amount(s) and type(s) of service authorized in writing by the county of financial responsibility according to Minn. Rules, part 9525.0065. The authorization for services to be provided has been attached, incorporated and made part of this contract.[36]

25. The Clearwater County contract also stated that the Provider would be paid "based on the approved unit cost for each authorized service times the number of units provided to each eligible person up to the number of units authorized in writing by the county of financial responsibility…."[37]

26. The contract was in effect from February 13, 1998 through February 12, 1999.[38] By incorporating the service agreements into its provider agreement, Clearwater County could extend or amend its underlying contract with Grove Homes with new service agreements rather than by amending the provider agreement itself.[39]

27. Mr. Gary acknowledged that the "authorization for services" referred to in the contract was the DHS service agreement generated through the MMIS.[40] That was also Mr. Marcum's understanding; Ms. Patterson York, the Department's Director of Disability Services, concurred.

28. Although the contract allowed for review of actual costs and adjustment of rates, Mr. Gary did not review Grove Homes' costs or expense reports.[41]

29. In 1996, Crow Wing County Social Services Supervisor Susan Mezzenga decided that Grove Homes should provide transportation to and from the day training and habilitation program (DT&H) for resident L.K. because of its distance from those programs. Apparently Ms. Mezzenga believed that it would be too time-consuming for the DT&H staff to drive the round-trips to Grove Homes, and that the DT&H would not be willing to provide the transportation. Thus, it appears that, as a condition of providing the supported living services, it was necessary for Grove Homes to provide transportation for L.K. to the DT&H. Ms. Mezzenga admitted that transportation was frequently an issue.[42]

30. Prior to K.K.'s placement at Grove Homes, Mr. Marcum had a serious disagreement with Ms. Mezzenga about transportation for L.K. L.K. damaged Grove Homes' van, and Ms. Mezzenga refused to pay for any damage, or for transportation.[43] Ms. Mezzenga left the meeting and wrote a letter that led the Marcums to fear she would neither place residents nor grant host county concurrence for placement at Grove Homes. The Marcums' characterized the relationship and negotiations with Ms. Mezzenga as difficult.[44] Ms. Mezzenga did not authorize

payment to Grove Homes to transport L.K., although she was aware that Grove Homes was doing it.

31. Ordinarily a DT&H must provide or arrange for transportation to and from its service sites for the persons receiving services.[45] Proposed rates are set by the county and approved by DHS.[46] Variances may be granted to the rates if requested by a vendor, and submitted to DHS by the county, in instances where a client presents very challenging behavior.[47] In this instance, it does not appear that any request was made either by the DT&H or Grove Homes for a variance to the rates for transportation. Instead, Grove Homes assumed the responsibility to transport D.L. and K.K. to their DT&H program. The round trip takes more than one and one half hours per day.[48]

32. Steve Benton, the Hennepin County case manager for D.L., and Mr. Gary, the Clearwater County case manager for K.K., understood that Ms. Mezzenga would not grant host county concurrence for D.L. and K.K. to receive DT&H unless Grove Homes assumed the responsibility for transportation.[49]

33. Mr. Benton approved two 30-minute supported living units per day to pay for transporting D.L. to and from the DT&H, using code x5415, at a rate of $9.96 for each unit.[50]

34. Mr. Gary followed the same procedure and authorized the same code, x5415, at the same cost for K.K.'s transportation. However, he authorized only one 30-minute supported living unit per day.[51]

35. Grove Homes consistently billed DHS using the transportation codes authorized by Mr. Benton and Mr. Gary. DHS investigators interviewed administrators at Lakes Employment Opportunities (LEO), the DT&H that K.K. and D.L. attended. The administrators stated that it was clear to all parties "from the very start" that LEO would not provide the transportation for these clients. The administrators stated that they would only transport within a 15-mile radius, and that Mr. Marcum had "wanted to transport" the clients. An administrator confirmed that Grove Homes had done the transport, although he "rarely" saw more than one staff person on the van.[52]

36. Mr. Marcum and Ms. Boileau disagreed that Grove Homes "wanted to transport" clients to the DT&H, but believed that they must do so in order to have clients placed with them.[53]

37. DHS issued a service agreement letter to Grove Homes, stating that the service agreement had been reviewed. It listed each approved service, including the approved quantity and rate. It stated:

> The service plan and continued eligibility for services must be reviewed annually and documented on the DD Screening Document by the case manager. Changes in the type, amount, frequency or rates of services must be made by the county. It is the provider's responsibility to review the client's continued program and Medical Assistance eligibility by contacting the Eligibility Verification System….[54]

38. The service agreement for K.K. dated March 13, 1998, included 365 units of supported living services at $181.02 per day, and 240 units of 30-minute supported

living services at $9.96.[55] The service agreement for D. L. included 480 units of 30-minute supported living services at $9.96.[56]

39. For K.K., Grove Homes billed at the rates of $181.02 for supported living, and $9.96 per day for transportation from February 1998 through June 30, 1998. For D.L., Grove Homes billed two units of transportation per day at $9.96 per unit.[57]

40. K.K. had trouble making the transition from BRHSC to Grove Homes. Ms. Boileau and Mr. Marcum spent many hours at Grove Homes helping the staff deal with his self-injurious behavior and intimidation of the staff. Many staff quit.[58] In May of 1998, Ms. Boileau requested assistance from Mr. Gary, and Mr. Gary requested assistance from the BRHSC.[59]

41. In July, 1998, K.K. threw a television set at a staff member and injured her. A team meeting was held to review K.K.'s service plan.[60] Ron Palm, a regional services specialist, met with Grove Homes to revise K.K.'s service plan.[61] He devised a plan to deal with K.K.'s behaviors, conducted staff training in September, and issued a report in November, 1998.[62] K.K.'s behavior would improve for a period of time, and then deteriorate.[63]

42. K.K. was difficult to transport because of his challenging behavior. On some occasions Grove Homes sent along a staff member to assist the driver during the trip. In one instance, an employee was hurt when K.K. removed his seat belt and grabbed the driver, causing an accident and injury to the employee.[64] The trip was long, and neither Mr. Marcum nor Ms. Boileau believed that the transportation rate fairly compensated them.[65]

43. Ordinarily, DHS approves rate increases to reflect cost of living adjustments (COLAs) each year. The COLA is usually effective on July 1st and is typically 1 to 3 percent.[66] In late June or early July 1998, Mr. Gary had not yet received the DHS bulletin announcing the COLA increase effective on July 1, 1998. To assure that Grove Homes could bill at an increased rate, Mr. Gary directed the county support staff to enter the maximum rate for supported living services into K.K.'s service agreement form on the computer.[67] At that time, the maximum daily rate for supported living services was $515 per day. The maximum rate for 30 minutes of supported living services (used by Mr. Gary to cover transportation to DT&H) was $103 per day.[68] Mr. Gary believed that entering the maximum rates would be a temporary fix and that he could change the rates after the DHS bulletin was issued. Mr. Gary expected Grove Homes to bill at the previous rates, plus the COLA.[69]

44. On July 24, 1998, DHS sent Grove Homes and Mr. Gary a service agreement letter for K.K., listing the prior rates, and the newly approved rates, authorizing 231 units of supported living services at $515 per day, and 144 units of 30-minute supported living services at $103.[70]

45. The service agreement letters state: "THIS SERVICE AGREEMENT HAS BEEN CHANGED DUE TO A RATE INCREASE. FOR BILLING PURPOSES, PLEASE MAKE SURE YOU SAVE THIS COPY."[71]

46. Mr. Marcum was pleased to receive notice of the rate increase because of the challenges K.K. presented, and he shared the information with Ms. Boileau. After consulting with his sister who believed that the increase was high, Mr. Marcum contacted the DHS help desk on July 28, 2004. He recited the dollar amount in the service agreement letter, was told that the rates were correct, and that additional questions should be directed to the county case manager.[72] There was no evidence that DHS reviewed the rate on the service agreement letter, although it had the authority to do so.[73] According to Ms. Patterson York, DHS does not normally review the rates for its 35,000 waiver recipients.

47. On or about August 12, 1998, Mr. Marcum called and left a message for Mr. Gary, accepting the rate increase, and checking to be sure it was correct. Mr. Gary did not return the call. On September 1, 1998, Mr. Marcum telephoned again and left another phone message. Once again, Mr. Gary did not return the call.[74] On September 11, 1998, Mr. Marcum wrote a letter to Mr. Gary reminding Mr. Gary that he had called about the service agreement, and current financial information for K.K. It stated:

> This is just a follow up letter concerning the last two phone calls I have made to you. The first on 8/12 concerning a review of the Service Agreement, and the last call, a couple of weeks ago, when I gave you [K.K.'s] current financial information that you had requested. Since I haven't heard anything, I assume that you received the information that you needed and that everything is as it should be. If you should need anything else, please don't hesitate to call.[75]

48. Mr. Gary did receive financial information about K.K. from Grove Homes on September 1, 1998.[76] Mr. Gary does not recall if he looked at the service agreements after he received Mr. Marcum's calls, but he did not return the calls and did not change the approved rates.[77]

49. On September 28, 1998, Ms. Boileau attended an interdisciplinary team meeting to discuss K.K.'s treatment plan. Ms. Boileau asked Mr. Gary at the meeting if the service agreements were correct, and Mr. Gary assured her that they were, and that Grove Homes should have no problem billing for services to K.K.[78] Ms. Boileau memorialized the conversation in a note to her brother.[79] Mr. Gary does not recall the conversation, but agrees that he might have told Ms. Boileau that the service agreements were correct.[80]

50. Ms. Boileau was concerned that the rate increases were a mistake, and discussed this with her brother. However, neither of them took any additional action to ensure that the rate increases were correct. Both concede that they did not request a specific rate increase, although both believed that the rates they had been paid were

too low to serve K.K. adequately and particularly that the low rates did not cover their labor costs.[81]

51. By letter dated July 7, 1998, Grove Homes was also notified that the rates for D.L. were going up. The daily living services increased to $166.53 from $161.68 per day, and the 30 minutes of supported living services used for transportation increased from $9.96 per unit to $10.26, for 337 units of service (two units per day), for the period from July 1, 1998 to March 20, 1999.[82]

52. The service agreements for K.K. were updated again in July 1999 and July 2000 to reflect COLA increases.[83] Because COLA increases are not automatic,[84] Clearwater County staff would have entered the adjustments into the MMIS to generate the new service agreement letters for K.K.[85]

53. By letter dated July 15, 1999, Grove Homes received a service agreement letter increasing K.K.'s supported living services to $535.60 per day, and the rate for 30 minutes of supported living services used for transportation increased to $107.12, effective July 1, 1999.[86] By letter dated July 27, 2000, Grove Homes was notified that its rates for K.K. were increasing to $567.74 and $113.55, effective July 1, 2000.[87]

54. From July 1998 through October 2000, Grove Homes billed DHS for supported living services to K.K. at the rates set forth in the service agreements, $515 for daily supported living services and $103 for the 30-minute supported living unit, plus the annual COLA increases.[88] Mr. Gary acknowledged that he authorized the rates on the DHS service agreements, and that he received the letters generated by the MMIS that documented the county's authorization.[89] Mr. Gary did not review the DHS service agreements during this time.[90]

55. Although Clearwater County continued case management for K.K. and Mr. Gary attended team meetings, the contract between Grove Homes and Clearwater County was not extended, except through the service agreements.[91]

56. DHS also sends counties monthly reports of their waiver expenditures.[92] But Mr. Gary acknowledged that he did not review them.[93]

57. For the same period, Grove Homes billed DHS for the transportation units Steve Belton authorized for D.L.[94]

58. In the fall of 2000, Mr. Gary learned that Clearwater County had exceeded its budget for waivered services. At that point, he realized that Grove Homes had been paid at the maximum rates for resident K.K. since July 1998.[95] A notation in his file states:

> I haven't been doing my job well. I have discovered thrugh (sic) computer 2.0 system as well as looking at Service Agreements that we are authorizing the state max for SL and Grove homes (sic) is collecting at that amount instead at what the host county contract would consider fair. See letters during this time frame. My lack of computer skills and interests

> have caught up with me but I will see what can be done to remedy it. Have correct (sic) the Service agreement but not sure what recourse we have in recovering over payment. See correspondence these dates. Gees!!!!![96]

59. Mr. Gary sent a letter to the Marcums stating that the rate effective on July 1, 1998 should have been $191.88, a 6 percent increase over the prior year, with additional 6 percent increases to $203.39 on July 1, 1999 and $215.59 on July 1, 2000. He also stated:

> In reviewing our service agreements for these periods of time I can understand what appears to be a miss-understanding (sic). All of our service agreements after 7-1-98 indicated a per day rate that was the maximum the state allows. At that time providers were having problems billing at there (sic) correct rate because our service agreement amounts were not correct. To resolve this we entered the state maximum rate with the expectation that the provider would bill at the host county contract rate rather then (sic) that listed. With this in mind could you explain your billing decisions?[97]

60. On the same day, November 7, 2000, Mr. Marcum responded to receipt of the letter setting lower rates. His letter outlined K.K.'s challenging behaviors, and "implored" Mr. Gary to work with the facility to negotiate an acceptable rate. It also detailed the costs of providing transportation, for mileage and staff time, and asked if the code for reimbursement would be reinstated on the new service agreement.[98]

61. On November 20, 2000, Mr. Marcum sent another letter, explaining that all the bills it had submitted reflected the service agreements in place until Grove Homes received the November 7 letter, and that it believed that the approved rates were correct and reflected the care that K.K. required. Mr. Marcum requested that the county reconsider its decision to reduce the rates.[99]

62. In a letter dated November 20, 2000 to Susan Mezzenga, Mr. Gary explained the adjustments made to Grove Homes' rates, but continued to approve payments for transportation, although at the lower rate. Mr. Gary explained that he increased costs at 6 percent per annum, and recalculated the overpayment. He also stated:

> Since our service agreement authorized the state maximum amount rather then (sic) the costs that maybe more intune (sic) with the host county agreement, we are not sure what remedies we have in regard to recovery. Also, without access to other client information at Grove Homes, we have no idea if we are being fair in setting our per day rate for supportive living and transportation or not.[100]

63. On December 6, 2000, Mr. Gary sent a letter to Richard Breen, an attorney for Grove Homes, requesting reimbursement.[101] After the letter was sent, Mr. Gary referred the matter to DHS for investigation.[102]

64. Mr. Gary admitted that he had approved the maximum rates for Grove Homes only, and not for other providers.[103]

65. At no time did Clearwater County request, nor did DHS issue, revised service agreements with lower payment rates for rates paid from July 1, 1998 through October 18, 2000.[104] Except for the service agreements, there were no written or oral communication by a state or county employee about the proper rates for K.K. or D.L.

66. Ms. Mezzenga testified that the rates paid to Grove Homes exceeded industry standards, but she acknowledged that the standards were not written down. She did not share the standards with Mr. Gary, and she was not involved in establishing the rate for supported living services for K.K. In addition, she did not testify to the appropriate reimbursement for transportation to D.L. and K.K.[105]

67. Ms. Patterson York testified that the average rate for supported living services was about $173 per day in 2004. Persons with higher rates would ordinarily have serious behavior problems, may be violent or abusive, or have a major medical challenge. Such persons ordinarily require extra staffing, or staff with special skills or training. Ordinarily, a large rate jump would be supported by a change in the approved staffing.[106]

68. Mr. Marcum believed that he could only bill DHS at the rates set in the service agreement, and that other rates, even lower rates, would be rejected.[107] Ms. Patterson York acknowledged that she did not know for certain until after DHS issued its Notice of Agency Action in this case that billings submitted below the rates in the service agreement would be paid.[108]

69. The DHS investigators concluded in their report, dated February 20, 2001:

> The County Case Manager, in an attempt to help the provider be able to bill, during a time when the county couldn't get the service agreement amounts correct, set the billable units for per diem and transportation at the maximum rates. There is no evidence that the case manager ever looked at the rates for over 2 years. Only when the county ran out of Waiver money did he than (sic) look for the cause. The provider appears to have made an attempt to resolve the rate issue, but did not try to (sic) hard to resolve this extremely large rate per diem.[109]

70. The investigators asserted that the excess should be recovered, in accordance with 9525.1910, subp. 4 C (3) & (4).[110]

71. The investigators also concluded that reimbursement to Grove Homes for transportation was appropriate but should have been set at one unit per day each for

D.L. and K.K. because a unit was intended to cover a round trip. The investigators did not attempt to determine the actual transportation costs.[111]

72. On April 17, 2001, Bob Cooke, one of the SIRS investigators, sent a memo to Deb Schauffert in the DHS Community Supports program asking about the proper billing for transportation. He explained that two counties had used Code X5415 (Supported Living – 30 minutes) for transportation in lieu of payment to the DT&H because the residents lived beyond the DT&H transportation service area.[112]

73. Ms. Schauffert did not directly answer Mr. Cooke's questions, but did quote several statutes. The cited provisions place the responsibility for DT&H on the county board, and require that it ensure that transportation is provided or arranged by the vendor in the most efficient way possible. However, her response implied in the final paragraph that payment for transportation could be made to a residential provider if the cost for transportation was not included in the approved rate paid to either the day habilitation provider, or to the residence for residential services.[113]

74. On April 17, 2001, Mr. Cooke also requested additional information from Mr. Gary.[114] In response, Mr. Gary stated that he included the maximum rate in the service agreement because it was easier than adjusting the service agreement when there were changes within the year. He did not explain the type of changes he meant. He did not recall that Grove Homes had requested an increase up to the state maximum, and thought that he would have noted such a request because he would have cleared the increase with the host county.[115]

75. In response to Mr. Cooke's questions about changes in K.K.'s health or behavior after entering Grove Homes, Mr. Gary replied:

> Actually a regression in behavior is expected when such individuals are moved. [K.K.'s] negative behaviors (self abuse, head banging, aggression, rectal digging) during the many years he was a resident at the Brainerd RHSC always went up and down. Medications would be adjusted but the behavior continued to rise and fall. In May, 1998, three months after his placement at Grove Homes, therapeutic intervention was requested by Grove Homes and I requested this intervention in my letter to James Butcher at [BRHSC] on 5-18-98…. This intervention seemed to help in that by January 1999 his negative behaviors did go down only to go up again in February 1999 (see chart). Other than allowing these therapeutic intervention costs no other adjustments were discussed.[116]

76. Mr. Gary also acknowledged that he did not review Grove Homes' expenses for K.K. after the 3rd and 6th month of service, as required by Part C 9 of the contract between Clearwater County and Grove Homes, or at any other time.[117]

77. The Department sent out a Notice of Agency Action on March 15, 2001. The Department claimed overpayments of $276,900.19 for supported living services and $52,189.08 for transportation for K.K. It arrived at these figures by reducing the

daily supported living rate to the initial rate set in 1998, plus an annual 6 percent increase, and by reducing the transportation reimbursement to one unit per day at the same unit rate paid for D.L. In addition, the Department claimed overpayments of $7,653.76 for transportation for D.L., reducing the reimbursement from two units to one unit per day.[118]

78. On April 10, 2001, Grove Homes filed its Notice of Appeal of the proposed agency action.[119] No overpayment was collected during the pending appeal.[120]

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner and the Administrative Law Judge have jurisdiction to consider the recovery of the overpayment.[121]

2. The Department has complied with all procedural requirements.

3. The Department has the burden of proving by a preponderance of the evidence that it is entitled to recover money from Grove Homes.

4. A provider may not bill the Department for more services or at a higher rate than the county case manager has authorized.[122] Clearwater County authorized the payments made to Grove Homes for K.K. Hennepin County authorized the payments to Grove Homes for D.L.

5. The Department has failed to show by a preponderance of the evidence that it should recover $276,900.19 from Grove Homes for supported living services for K.K. The payments were authorized by the Clearwater County case manager, and complied with the law.

6. The Department has failed to show by a preponderance of the evidence that it should recover $52,189.08 from Grove Homes for providing transportation services to K.K. The payments were authorized by the Clearwater County case manager, and complied with the law.

7. The Department has failed to show by a preponderance of the evidence that it should recover $7,653.76 from Grove Homes for providing transportation services to D.L. The payments were authorized by the Hennepin County case manager, and complied with the law.

8. The County must assure that payments meet certain criteria set forth in Minn. R. 9525.1910, subp. 4. The cost must be “what a prudent and cost conscious business person would pay” for the service in the open market in an arm’s length transaction.[123] Providers agree to comply with these rules.[124] The Department has failed to show by a preponderance of the evidence what a prudent and cost conscious business person would pay for the services authorized by the respective counties for K.K. and D.L.[125]

9. The Department's proposed recoupment does not constitute a fine and does not violate the United States and Minnesota Constitutions or Minn. Stat. § 14.045.

10. The Department may recover an amount from Grove Homes for any transportation payment on days that D.L. or K.K. were not transported to a DT&H.

11. Even if the Department's payments to Grove Homes were unauthorized, recovery is barred by equitable estoppel.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Department recover from Grove Homes only the transportation payments made on days that D.L. or K.K. were not transported to a DT&H.

Dated this 30th day of November 2004.

S/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Tape-recorded (ten tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

In 1983, Minnesota was granted a waiver by the federal government to provide home and community-based services to persons with mental retardation or related conditions (MR/RC waiver).[126] The waivered services program is governed by the formal waiver plan executed between DHS and the federal government.[127]

Under Minnesota's approved MR/RC waiver, county agencies manage many aspects of waivered services, including determining which person will be offered services, what level of services will be provided, and negotiating contracts with service providers.[128]

In this case, Hennepin County case manager Steve Benton authorized two 30-minute units of service per day to pay Grove Homes for D.L.'s transportation to the day training and habilitation program (DT&H). The Department contends that Mr. Benton was not authorized to approve payment for two units of transportation to Grove Homes, but it will allow one unit per day at the rate a DT&H would be paid.

Clearwater County case manager Howard Gary authorized payment to Grove Homes for one unit of service for K.K.'s transportation to the DT&H, plus a daily rate for supported living services. The Department contends that the payment rates Mr. Gary authorized from July 1, 1998 through October, 2000 were too high. Although Clearwater County never gave Grove Homes any other rate, and did not check either Grove Homes' costs or its billings, the Department determined that Grove Homes should be paid at its rates on June 30, 1998, plus six percent a year. The Department did not explain why a six percent increase was selected.

Right of Recovery

The Commissioner has the right to recover money from a vendor who is improperly paid as a result of vendor or department error, "regardless of whether the error was intentional."[129] Thus, the key to this case is whether Grove Homes was improperly paid as a result of error. There is no basis to conclude that it was. The Department has not cited any statute or rule that Grove Homes has violated, nor any statute or rule that precluded the payment that was made. In contrast, the Clearwater County social worker, Howard Gary, stated unequivocally that he had submitted a service agreement to the Department authorizing the payments that were made. He had the authority to do so, and he acknowledged that he failed to track either the service agreements or the payments. Once the county exceeded its waiver allocation, Mr. Gary looked at the payments and determined that he had authorized too much. Yet, there is no notation of any kind, nor any evidence, about what rates were appropriate to provide the approved services for K.K. Similarly, Mr. Benton authorized two units of transportation for D.L., and the Department failed to show that this was unauthorized or exceeded the cost.

Under the MR/RC waiver, the county has the discretion to determine the services that each individual needs, negotiate with providers to deliver those services, and set the rate it will pay.[130] The Department does not set a fee schedule for waivered services as it does for most services covered by the MA program. Instead, the Department allocates money to the county agencies for the home and community-based waivered services, and the county must manage those resources within its allowable reimbursement average.[131] The county case managers develop an individualized service plan for each client that sets the amount and frequency of the services.[132] The county case manager must monitor the services that are provided to assure that the individual service plan is followed, and that necessary changes or modifications are made.[133]

The critical distinction with a waiver is that the county approves the payment level for home and community-based services. "Payments for home and community-based services provided to individual recipients shall not exceed amounts authorized by the county of financial responsibility."[134] In this case, the Clearwater County case manager authorized payment at the maximum rate, and Grove Homes billed at the authorized rate. The Department's claim is that the county case manager did not expect Grove Homes to bill at the rates that he authorized for K.K.'s services. Yet there is no evidence in the record that Grove Homes was notified between July 1, 1998 and November 2000 of any other authorized or approved rates.

Clearwater County had all the information it needed to track the payments and correct a misunderstanding, if there was one. It did not. The payments did not violate any statute or rule. In addition, although the county case manager later concluded that he had authorized too much, he also acknowledged during the investigation that he did not know what the appropriate lower rate was for K.K.'s transportation or supported living.

As for transportation services to D.L., the services were indisputably authorized by the county case manager, and there is no evidence that the authorization was incorrect. The Department concluded that Grove Homes could be paid for transportation, but it lowered the rate to one used by a DT&H, even though Grove Homes was handling the transportation because the DT&H would not. The Department offered no evidence that the authorized rates were higher than the amount necessary to fairly compensate Grove Homes for D.L.'s transportation.

Although the Department now claims that Grove Homes was overpaid, it can not state with any certainty how much Grove Homes was overpaid. Grove Homes' operating expenses exceeded the rate that the Department now claims was appropriate. Because Grove Homes was given an increase, it had no reason to negotiate an increase from its initial rate to account for K.K.'s challenging behaviors, both at the group home and during the long transport to day training.

It is true that the high rates that were approved appear to overcompensate Grove Homes for its actual costs. However, payments for waivered services are not predicated on actual costs alone. Although Medical Assistance payments are ordinarily paid at the usual and customary charge for that service by all providers, the payments under the MR/RC waiver are negotiated individually with each provider for each person receiving services. This is a significant difference in the method of reimbursement.

The Department relies on the language of Minn. R. 9525.1910, subp. 4, for the criteria that should be applied in determining the reasonableness of the rates paid. However, it is clear from the face of the rule that it governs the relationship between the Department and the county, and that the standards are intended to guide the counties in the negotiation of its rates with providers. It specifically states: "In authorizing and billing for home and community-based services for individual persons, the county board must comply with items A to C."[135] If the county's expenditures do not meet the federal requirements under the waiver, and federal dollars are not paid, or must be returned, the county is responsible for paying its share of the excess. Nothing in this rule states or implies that a provider should repay money that the county overspent.

The Department claims that such a reading would preclude any repayment from a provider unless the county exceeded its state allotment, but that is incorrect. If the provider billed more or, through error, was paid more than the county authorized, the Department would be able to recover the overpayment.[136] The key distinction here is that the provider billed and was paid the amounts authorized by the counties. Furthermore, Ms. Patterson York testified that the county case manager had the authority to set an individualized rate, up to and exceeding the recommended state maximum.

Although the provider must agree that its charges will comply with 9525.1910, that rule places the primary responsibility on the county. This assignment of responsibility is consistent with the statute that states that the county case manager has the primary responsibility for the review and authorization of services, including specific services, amount and frequency.[137]

A provider who fails to comply with the terms of participation in the provider agreement is subject to monetary recovery.[138] However there is no evidence that Grove Homes violated its provider agreement or billed more than the county authorized. Ms. Patterson York and Mr. Gary agreed that the service agreements were authorizations for service, incorporated into the provider agreements.

The Department takes the position that Grove Homes "should have known" that it could not bill at the rates authorized on the service agreements. However, it is not clear how it should have known. The Department contends that the owners of Grove Homes didn't ask the right questions or enough questions when K.K.'s service agreement was issued. However, the evidence shows that Mr. Marcum called DHS, that he was told that the service agreement was correct, and that he should call the county case manager if he had questions. He called the county case manager at least once, he followed up with a letter, and his sister asked the case manager if the service agreement was correct. Apparently, because the Marcums did not specifically ask the county case manager if the $515 and $103 rates were the correct rates to bill, the Department believes that Grove Homes should repay the money.

Mr. Gary had the authority to set the rate, the service agreement was issued at Mr. Gary's specific direction, and Mr. Gary received monthly reports of the amount paid to Grove Homes. By his own admission, he did not look at the service agreement and did not look at the reports. Not only did Mr. Gary not review the documents he received, he apparently authorized subsequent increases on July 1, 1999 and July 1, 2000. The payments were within the maximums allowed by the Department, and the total payments were within DHS's allocation to the county. Thus, no rule or statute was broken by Mr. Gary's actions, or by the bills Grove Homes submitted.

As for D.L.'s transportation, the only evidence was Hennepin County's approved service agreements. There was no reason for Grove Homes to question them.

The Department's calculation of the amount owing is also confusing and unsupported by statute or rule. For K.K., the Department allowed the rates in effect on June 30, 1998, plus six percent a year. There was no rationale offered for selecting a 6 percent increase, which was not, apparently, the approved COLA for those years. The Department had information about the costs to care for and transport K.K, but it did not consider them. Similarly, although the Department apparently conceded that the unorthodox transportation payments could be made to Grove Homes, its rationale for limiting the reimbursement to the amount paid to a DT&H makes no sense. A DT&H rate is based on its costs and is an average to cover all clients. The counties were negotiating an individual rate for Grove Homes to transport D.L. and K.K. because the transportation went well beyond the distance the DT&H would ordinarily transport. Thus, there is no rational explanation for limiting payments to the level of the DT&H rate. This is especially true for D.L.'s transportation. Apparently Mr. Benton determined

that one unit of the DT&H rate was insufficient to reimburse Grove Homes. There was no evidence to the contrary. Yet, the Department rejected the case manager's determination and made its own without looking at the costs.

The Department claims that its conclusions were justified because Grove Homes continued to serve K.K. after Clearwater County lowered the rate. Admittedly, this suggests that the previously approved rates were too high. However, once Grove Homes knew about its lower rates, it could also adjust its expenses. In light of the pending recoupment action, it is not surprising that Grove Homes did not press for higher rates. Mr. Marcum's letter imploring Mr. Gary to reconsider the precipitous rate drop suggests that the reimbursement may not be adequate.

It's fair to ask why Mr. Marcum and Ms. Boileau did not more directly challenge Clearwater County's rate increase. But they were relatively inexperienced providers who believed that the case manager set the rates through the service agreement, and the provider must bill at those rates. It is significant that Ms. Patterson York, Director of the Disabilities Division, testified that she was not aware that a provider could bill below the approved rate until after the Department initiated this action. Grove Homes twice asked Mr. Gary whether the new service agreement was correct, and he reassured them. In addition, he allowed month after month to go by without suggesting that Grove Homes was overpaid. Only when the county exceeded its allocation, and faced possible exposure, did Mr. Gary attempt to lower the rates.

As for the payments for D.L., there was no reason at all for Grove Homes to raise questions. Hennepin County's approval of two units of service was consistent with the unusually long trip from Grove Homes to the DT&H.

The Proposed Action Does Not Constitute An Excessive Fine

Grove Homes also argues that the Department's actions constitute imposition of an excessive fine, in violation of the United States and Minnesota Constitutions and Minn. Stat. § 14.045. This argument has no merit. The Department's claim is for recovery of an alleged overpayment of state dollars, not a penalty for violating the law.

Equitable Estoppel

Even if the payments can be characterized as an "error," collection would be unjust under the facts of this case. The concept of equitable estoppel assumes that the Department has a valid claim for payment, but that there are strong reasons why it should not be permitted to enforce it. As more fully discussed above, there is no legal basis to conclude a payment was made that violates any statute or rule. However, in the event that the Commissioner concludes otherwise, the facts of this case support estoppel.

A party claiming estoppel against the government bears a heavy burden.[139] The concept is not freely applied because government funds should not be spent except as authorized by law.[140] The test for estoppel has been defined in different ways, but can be summarized as follows: First, there must be a wrongful act by the government. This act must be an affirmative act, and not just a mistake, omission or inadvertent error. Imperfect conduct is not sufficient to warrant estoppel. Second, the party asserting estoppel must have relied upon the government's error in good faith, and exercised

reasonable prudence in its dealings with the government. Third, the party that relied upon the government's action must have done so to its detriment. Above all, the public interest must be considered. Will estoppel defeat an important public policy, undercut the government's appropriate authority, or deplete the public fisc?

The Department contends that estoppel should not lie because providers such as Grove Homes who seek public funds must act with scrupulous regard for the requirements of the law, they are expected to know the law, and they may not rely upon the conduct of government agents that is contrary to law.[141]

Wrongful Act of the Government

Affirmative misconduct is required to estop the government.[142] In this case, it is clear that if an overpayment was made, Mr. Gary was the person responsible for authorizing the services, the units of services and the rates for K.K., and Mr. Benton did the same for D.L. These actions were done intentionally and renewed regularly. This is not a case where the government payments were not authorized and did not comply with governing statutes or rules, but were paid because of a mistake in the computer program.[143] Here, the county case managers had the authority to set rates and they did so within the acceptable limits. Mr. Benton intentionally approved two units of service each day for D.L.'s transportation. Mr. Gary attended meetings, reviewed K.K.'s file, authorized rates for services, and did not review reports of the costs incurred for K.K.'s care. His behavior far exceeded simple inadvertence or imperfect conduct. Thus, if indeed the case managers' decisions violated a statute or rule, their errors were clearly the result of intentional, affirmative conduct by authorized individuals.

Reasonable Reliance

Grove Homes is a small, four-bed facility. K.K. and D.L. were among its first residents. It had delivered services to K.K. for only a few months when its rates for his care increased, and during those months, K.K. had presented many challenges both at the facility and while being transported. The challenges rose to the level that Grove Homes requested a consultation with the BRHSC specialist. Property had been damaged and many staff had quit. Thus, some rate increase may have been appropriate. Admittedly, the size of the increase was very unusual, and the notice of the increase prompted at least one contact with DHS and three with the county case manager. Each time, Grove Homes was assured that the service agreements were correct. Yet, the Department contends that it was unreasonable not to pursue confirmation more aggressively, and that Ms. Boileau knew it was improper to bill the higher rate. Even if one could conclude that Grove Homes' reliance in the first year was suspect, the subsequent renewal of the rates with a COLA in both 1999 and 2000, and the regular reports to Clearwater County of costs incurred, were ample reason for Grove Homes to rely on the high rates. Just because Grove Homes could have been more aggressive does not mean that its reliance was unreasonable. This is not a case where the party relied solely on an oral representation of an agency staff member or intermediary or failed to familiarize oneself with the law.[144] As for D.L.'s transportation, nothing in the evidence suggests Grove Homes should have questioned Hennepin County's authorization.

Detrimental Reliance

It is not disputed that Grove Homes increased its operating expenses in reliance upon the higher approved rates. It incurred approximately $187,000 that it could not, and would not have incurred without the rate increases.[145] It is also significant that Mr. Gary could not say whether the lower reimbursement rates would adequately compensate Grove Homes for K.K.'s care and transportation. The Department did not attempt to determine what the actual costs or appropriate rates would have been.

Similarly, at no time did the Department attempt to determine Grove Homes' costs for D.L.'s transportation. Instead, the Department assumed that one unit of service at the rate paid to a DT&H was adequate. There was no evidence that Mr. Benton's approved transportation reimbursement was too high to fairly compensate Grove Homes for the long daily van trips to the DT&H.

Relative Equities

Ordinarily, the public good will take precedence over the private interest. It may be that Grove Homes was paid more than a conscientious case manager would have approved for K.K.'s case. The Department refers to Exhibit 23 as evidence of excessive compensation to Grove Homes' owners. However, the evidence was not clear about how the Marcums were paid for the hours they worked with the residents. If those hours were compensated through the distribution to them, in whole or in part, the charts are meaningless. Imposing repayment of over $300,000 on a four-bed group home is likely to put it out of business.[146] In contrast, although $300,000 is a substantial sum of money, it is insignificant in comparison to the hundreds of millions of dollars the MA program disperses annually. If there is a basis to recover this money, it should be recovered from the counties that authorized its payment, and not from Grove Homes.

B.J.H.

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[1] Following the close of the hearing, the parties agreed to supplement the record with the Affidavit of Greg Krause, State Ex. 31, and the Third Affidavit of Samuel D. Orbovich, Facility Ex. M.
[2] *See* 42 U.S.C. § 1396n(b)(c); 42 C.F.R. § 430.25.
[3] Minn. Stat. § 256B.092, subds. 4(c) and 5 (2002); Test. of Shirley Patterson York.
[4] *See* 42 U.S.C. § 1396n(c)(2); Minn. Stat. § 256B.092, subd. 4(b).
[5] Minn. Stat. § 256B.092, subd. 5.
[6] Minn. Stat. § 256B.501, subd. 1(c); Minn. R. 9525.1860, subp. 1A.
[7] Minn. Stat. § 256B.092.
[8] Test. of Patterson York; Minn. R. 9525.1890.
[9] Minn. R. 9525.1900.
[10] Minn. R. 9505.0195; Test. of Patterson York.
[11] Minn. R. 9525.1870, subp. 1; Test. of Patterson York; Test. of Susan Mezzenga.
[12] Minn. R. 9525.1870, subp. 1D; S*ee, e.g.,* State Ex. 26 at 354*.*
[13] State Ex. 26.
[14] State Ex. 2, § N.3; Minn. R. 9525.1870, subp. 2.
[15] *See, e.g.*, State Ex. 26 at 348.
[16] *Id.*
[17] Minn. R. 9525.1910, subp. 4; Test. of Patterson York; Test. of S. Mezzenga.
[18] Minn. R. 9525.1910, subp. 5; Test. of Patterson York.
[19] Test. of Patterson York.
[20] Test. of Patterson York; Test. of S. Mezzenga.
[21] Test. of Patterson York; Test. of R. Cooke; Test. of S. Mezzenga.
[22] Minn. Stat. § 256B.092, subds. 1-1e; Minn. Stat. § 256.02, subd. 4; Minn. R. 9525.0004, subp. 7.
[23] Minn. Stat. § 256B.092, subd. 8a.
[24] Test. of Patterson York.
[25] State Ex. 2.
[26] *Compare* State Exs. 2 *and* 21.
[27] Test. of S. Mezzenga.
[28] Test. of Patterson York; Test. of S. Mezzenga; Fac. Ex. K at 17-18; State Exs. 3-7.
[29] Test. of Patterson York.
[30] Test. of R. Cooke, State Ex. 31 at ¶ 6; Minn. Stat. § 256B.092, subd. 4(c).
[31] State Ex. 17 at 118-130.
[32] State Ex. 30 at ¶ 7.
[33] State Ex. 2.

[34] State Ex. 2 at 9 (¶ E.1).
[35] State Ex. 2 at 6 (¶ B).
[36] State Ex. 2 at 10 (¶ E.5).
[37] State Ex. 2 at 11 (¶ G.3), referencing 9525.0065 (repealed).
[38] State Ex. 2 at 5.
[39] Test. of R. Cooke; Test. of S. Mezzenga; Fac. Ex. K at 46-48; *see* State Ex. 16 at 117 and State Ex. 6 at 21-22.
[40] Fac. Ex. K at 16-17.
[41] State Ex. 16 at 107-08.
[42] State Ex. 10; Test. of L. Boileau.
[43] Fac. Exs. C, E and H.
[44] Test. of S. Mezzenga.
[45] Minn. Stat. § 252.45.
[46] Minn. Stat. § 252.46, subds. 1 and 5; Minn. R. 9525.1290, subd. 1C.
[47] Minn. Stat. § 252.46, subd. 6.
[48] Test. of J. Marcum.
[49] Test. of J. Marcum; Marcum Aff. (Fac. Ex. D) at ¶ 22; Test. of L. Boileau.
[50] State Ex. 5 at 19; State Ex. 21 at 207; Test. of J. Marcum; test. of L. Boileau; Marcum Aff., Exs. N-P.
[51] State Ex. 3 at 16.
[52] State Ex. 13 at 96.
[53] Test. of J. Marcum; Test. of L. Boileau.
[54] State Ex. 3 (emphasis added).
[55] State Ex. 3.
[56] State Ex. 21 at 207; State Ex. 5.
[57] State Ex. 24 at 340-43.
[58] Test. of L. Boileau.
[59] State Ex. 16 at 113.
[60] Fac. Ex. E at 7-12.
[61] Marcum Aff., Ex. E at 14.
[62] Fac. Ex. F at 17.
[63] *See* State Ex. 16 at 114.
[64] Test. of J. Marcum.
[65] Test. of J. Marcum; Test. of L. Boileau.
[66] Test. of Patterson York.
[67] State Ex. 30 at ¶ 9.
[68] Test. of R. Cooke.
[69] State Ex. 30 at ¶ 9.
[70] State Ex. 4 at 17-18; State Ex. 7 at 23-24.
[71] State Ex. 4.
[72] Test. of J. Marcum; *see* notation on State Ex. 4.
[73] Minn. R. 9525.1910, subp. 3.
[74] Test. of J. Marcum; State Ex. 12 at 94-95; Test. of L. Boileau.
[75] Marcum Aff., Ex. D.; State Ex. 12 at 93.
[76] State Ex. 16; *see also* State Ex. 9 at 56 (H. Gary's case note from 9/1/98).
[77] Ex. K at 55.
[78] Test. of L. Boileau; State Ex. 12 at 92.
[79] State Ex. 12 at 92.
[80] Ex. K at 56-57.
[81] Test. of L. Boileau; Test. of J. Marcum.
[82] State Ex. 5.
[83] State Ex. 6.
[84] Test. of Patterson York.
[85] Test. of Patterson York.
[86] State Ex. 6.
[87] *See* State Ex. 7; State Ex. 6 at 22.
[88] Test. of R. Cooke; State Ex. 24 at 340-44.

[89] Fac. Ex. K; State Exs. 3-7.
[90] Fac. Ex. K at 91-95.
[91] Fac. Ex. K at 106-09; State Ex. 9 at 56-58 (Mtgs. or file review on: 11/17/98, 2/26/99, 3/16/99, 4/19/99, 9/30/99, 10/15/99, 11/22/99, 1/11/00, 2/16/00, 4/14/00, 6/12/00, 9/20/00).
[92] Test. of Patterson York.
[93] Fac. Ex. K at 61-64.
[94] State Ex. 24 at 342.
[95] Test. of R. Cooke.
[96] State Ex. 9 at 58.
[97] State Ex. 8 at 38 and 45.
[98] State Ex. 8 at 39-40.
[99] State Ex. 8 at 41.
[100] State Ex. 8 at 42-44 (emphasis added).
[101] State Ex. 8 at 53-54.
[102] State Ex. 14 at 97; Fac. Ex. K at 31; Test. of R. Cooke.
[103] Fac. Ex. K at 66-69.
[104] Test. of Patterson York; Test. of R. Cooke; Fac. Ex. K at 82.
[105] Test. of S. Mezzenga.
[106] Test. of Patterson York.
[107] Test. of J. Marcum; *See also* Test. of L. Boileau.
[108] Test. of Patterson York.
[109] State Ex. 14 at 99.
[110] State Ex. 14 at 100.
[111] State Ex. 14 at 100. There is also a finding that Grove Homes billed for some days that transportation was not provided. Grove Homes does not challenge that finding.
[112] State Ex. 15 at 101.
[113] State Ex. 15 at 103.
[114] State Ex. 16 at 104.
[115] State Ex. 16 at 107.
[116] State Ex. 16 at 107-08.
[117] *Id*.
[118] Notice and Order for Hearing, Attachment A.
[119] Notice and Order for Hearing, Attachment B.
[120] Minn. Stat. § 256B.72.
[121] Minn. Stat. §§ 14.50 and 256B.064, subd. 2.
[122] Minn. Stat. § 256B.092, subd. 4(c).
[123] Minn. R. 9525.1910, subp. 4(c).
[124] Minn. R. 9525.1870, subp. 1D.
[125] Minn. R. 9525.1910, subp. 4.
[126] Patterson York Aff. at ¶ 4.
[127] Patterson York Aff. at ¶ 4.
[128] Minn. Stat. § 256B.092.
[129] Minn. Stat. § 256B.064, subd. 1c; Minn. R. 9505.0465, subp. 1A; *see also* Minn. R. 9505.2215, subp. 1A.
[130] Minn. Stat. § 256B.092, subds. 1 and 1a(5).
[131] Minn. Stat. § 256B.092, subd. 4.
[132] Minn. Stat. § 256B.092, subds. 1a and 1b.
[133] Minn. Stat. § 256B.092, subd. 1e(b).
[134] Minn. Stat. § 256B.092, subd. 4(c) (emphasis added).
[135] Minn. R. 9525.1910, subp. 4.
[136] *See* Minn. Stat. § 256B.092, subd. 4(c).
[137] *Compare* Minn. Stat. § 256B.092, subd. 1a, 1e(b) and 4(c) *with* subd. 1e(a).
[138] Minn. R. 9505.0195, subp. 6.
[139] *Ridgewood Dev't Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980).

[140] Estoppel is also disfavored by the courts to avoid interfering with the separation of powers between the judicial and executive branches. But that concern is not applicable here where the executive branch will make the final decision, subject to appeal. *See id.* at 292.
[141] *See Heckler v. Community Health Servs*., 467 U.S. 51, 63, 104 S.Ct. 2218, 2225 (1984).
[142] *Ridgewood Dev't. Co. v. State,* 294 N.W.2d 288, 292-93 (Minn. 1980); *In re Westling Manufacturing,* 442 N.W.2d 328, 332 (Minn. App. 1989).
[143] *See Brown v. Dept. of Public Welfare,* 368 N.W.2d 906 (Minn. 1985).
[144] *Compare Brown*, *supra*, at 192; Heckler, *supra*; *Westling Manufacturing*, *supra*.
[145] Fac. Ex. B.
[146] Test. of J. Marcum; Test of Patterson York.